

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOHN PETSINGER,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	No. 98-3377
	:	
JOHNNY BUTLER, in his official capacity	:	
as Secretary of Labor and Industry,	:	
Commonwealth of Pennsylvania;	:	
J. MATTHEW WOLFE, Chief Counsel,	:	
Department of Labor and Industry, in his	:	
individual capacity, and OFFICER	:	
ROBERT J. ELAND, Pennsylvania State	:	
Capital Police Department, in his individual	:	
capacity,	:	
Defendants.	:	

**MEMORANDUM-ORDER**

**GREEN, S.J.**

**September 22, 1998**

Presently before the court is Defendants Butler, Wolfe and Eland's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and Plaintiff's Response thereto. The plaintiff brings this action alleging his constitutional rights were violated when criminal charges were brought against him by defendant Eland and when he was denied access to the property of the Office of Vocational Rehabilitation ("OVR"). For the following reasons, Defendants' Motion will be granted as to Count III of the Complaint and denied as to Counts I and II of the Complaint.

**FACTUAL BACKGROUND**

On March 3, 1988, OVR terminated the plaintiff from his employment as a vocational rehabilitation counselor for OVR. The plaintiff then sought services from OVR, and in May 1995, the plaintiff and OVR jointly developed an Individualized Written Rehabilitation Plan. As a client of OVR, the plaintiff requested a change of counselors, and said request was denied by

OVR. The plaintiff appealed the denial of his request, and OVR forwarded the appeal to the State-wide impartial Hearing Service (“SIHS”). Prior to the scheduled hearing, the Executive Director of OVR withdrew the plaintiff’s request for a hearing, and the hearing was eventually canceled.

On June 17, 1996, the plaintiff filed suit against OVR and the Executive Director of OVR under § 1983 for their failure to comply with the mandates for appellate review prescribed in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq. See Petsinger v. Office of Vocational Rehabilitation, 1997 WL 634505 (E.D. Pa. 1997). On May 17, 1997, defendant Eland filed criminal charges against the plaintiff for Harassment by Communication. The plaintiff alleges these charges were filed “with the knowledge and/or at the direction of defendant Wolfe.” (Compl. at ¶ 22). The plaintiff further alleges that on September 17, 1997, he was prevented from entering OVR’s premises and told by defendant Eland, at defendant Wolfe’s direction, that he was no longer welcome on OVR’s property. (Compl. at ¶ 23). According to the plaintiff, the orders preventing him from entering OVR’s premises were issued under the authority of defendant Butler. (Compl. at ¶ 23).

On September 29, 1997, this court granted Plaintiff’s Motion for Summary Judgment finding that the defendants did arbitrarily deny the plaintiff due process in withdrawing his appeal from the SIHS. Petsinger, 1997 WL 634505 at \*1. A hearing was held on the criminal charges filed against the plaintiff on October 1, 1997. The plaintiff alleges that after the hearing, defendant Eland threatened him by telling him that if he did not stay off OVR property, he would be arrested for trespassing. (Compl. at ¶ 25). A letter was sent to the plaintiff from the Office of Chief Counsel of the Department of Labor and Industry advising him that he was not to visit the

OVR without written consent of the Commonwealth of Pennsylvania, and any attempt to visit the OVR would be viewed as a defiant trespass which could result in his arrest. (Pl.'s Ex. A). The criminal charges against the plaintiff were dismissed on July 2, 1997. (Compl. at ¶ 26).

The plaintiff claims in Count I of his Complaint that the actions of the defendants deprived him of his right to freedom of expression under the First and Fourteenth Amendments because he was prohibited from communicating with defendants concerning his right to an appeal process. (Compl. at ¶ 30). The plaintiff alleges that the actions of defendants Wolfe and Eland were taken in retaliation for the plaintiff's attempts to discuss his case, for his complaints against OVR and for his suing OVR to vindicate his rights. (Compl. at ¶ 29). In Count II of the Complaint, the plaintiff brings a claim for malicious prosecution under § 1983 alleging that defendants Wolfe and Eland intentionally and maliciously filed the criminal charges against him without probable cause and for a purpose unrelated to the administration of justice, thereby violating his rights under the Fourth and Fourteenth Amendments. (Compl. at ¶ 37). Finally, in Count III of the Complaint, the plaintiff claims that when defendants Wolfe, Eland and Butler denied him access to OVR property, he was denied his First Amendment right to redress his grievances with OVR, his federally guaranteed right to rehabilitation services pursuant to Title I of the Rehabilitation Act, and a property interest subject to protection by the Due Process Clause. (Compl. at ¶¶ 41-43).

## **DISCUSSION**

A motion to dismiss a complaint for failure to state a claim may not be granted unless it appears from the face of the complaint that the plaintiff can establish no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The facts must be taken as

true and reviewed in the light most favorable to the plaintiff. Id. In order to state a claim under § 1983, the plaintiff must prove that he suffered a violation of rights created by federal law at the hands of a person acting under color of state law. Karnes v. Skrutski, 62 F.3d 485, 490 (3d Cir. 1995).

The defendants argue that the plaintiff has not been deprived of any right created by federal law when he was prevented from entering the OVR premises. The First Amendment is violated by unreasonable and unequal restrictions on access to public property, as well as by the delegation of authority to a single person to determine who may use public property for free speech. Dallas Ass'n. of Community Orgs. for Reform Now v. Dallas Cty. Hosp. Dist., 670 F.2d 629, 632 (5th Cir. 1982) (citing Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969)). Whether the government must permit access to public property for expressive activities depends on the nature of that property. United States v. Bjerke, 796 F.2d 643, 647 (3d Cir. 1986). As questions related to the nature of the property in question, the defendants' reason(s) for denying the plaintiff access to said property and the plaintiff's intention(s) in seeking access to the property need to be resolved, Defendant's Motion to Dismiss Count I will be denied as to the plaintiff's claim under the First Amendment for a denial of access to public property against defendants Wolfe and Eland.

The plaintiff claims in Count III of the Complaint that because he was prohibited from accessing the OVR property, he was denied a First Amendment right to redress his grievances with OVR, the right to rehabilitation services pursuant to Title I of the Rehabilitation Act, and a property interest under the Due Process Clause. The plaintiff's civil action 96-4433 was still pending before this court when the plaintiff attempted to access the OVR property on September

17, 1997, and said action dealt with the plaintiff's grievances related to the rehabilitation services he previously received from OVR. The plaintiff does not allege in the present Complaint that when he attempted to access the OVR, he was seeking any rehabilitation services unrelated to those services that were the subject of civil action 96-4433. Therefore, this court concludes that the plaintiff has failed to set forth any facts to support a claim under the Rehabilitation Act, and to the extent plaintiff is attempting to relitigate the claim he raised in civil action 96-4433 under the Rehabilitation Act, said claim would be barred by the doctrine of res judicata as this court has already granted plaintiff the relief he requested in civil action 96-4433.

The plaintiff also does not allege that he was attempting to petition the government for redress of grievances unrelated to the grievances plaintiff raised in civil action 96-4433, and in fact, the plaintiff alleges that he was attempting to speak to the defendants concerning his right to an appeal process, which appears to be directly related to civil action 96-4433. Therefore, the plaintiff has failed to set forth any facts to support a claim under the First Amendment for a denial of the right to petition the government for redress of his grievances with OVR, and to the extent plaintiff is attempting to relitigate his grievances with OVR related to the services he previously received from OVR, said claims would be barred by the doctrine of res judicata. This court also concludes that the plaintiff has failed to state a claim that he was deprived of a property interest subject to protection by the Due Process Clause when he was denied access to OVR as this court cannot contemplate any such cause of action based on the facts alleged in the Complaint. As the plaintiff has failed to state a claim under the Rehabilitation Act, the right to petition the government for redress of grievances under the First Amendment, and the Due Process Clause, Defendants' Motion to Dismiss will be granted as to Count III of the Complaint.

The defendants argue that the plaintiff has failed to state a claim for malicious prosecution in Count II of the Complaint. To state a claim for malicious prosecution under § 1983, a plaintiff must demonstrate that (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) the malicious prosecution was committed by state actors; and (3) he was deprived of liberty. Sneed v. Rybicki, 146 F.3d 478, 480 (7th Cir. 1998).

Pennsylvania law requires the plaintiff to demonstrate that (1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in the plaintiff's favor; (3) the proceeding was initiated without probable cause; and (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice. Hilfirtly v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996).

Reading the facts in the light most favorable to the plaintiff, this court concludes that Plaintiff has stated a claim under § 1983 for malicious prosecution against defendants Eland and Wolfe. Therefore, Defendants' Motion to Dismiss Plaintiff's § 1983 claim for malicious prosecution in Count II of the Complaint will be denied.

An appropriate Order follows.

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Plaintiff,	:	CIVIL ACTION
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	:	
JOHNNY BUTLER, in his official capacity	:	
as Secretary of Labor and Industry,	:	
Commonwealth of Pennsylvania;	:	
J. MATTHEW WOLFE, Chief Counsel,	:	
Department of Labor and Industry, in his	:	
individual capacity, and OFFICER	:	
ROBERT J. ELAND, Pennsylvania State	:	
Capital Police Department, in his individual	:	
capacity,	:	
Defendants.	:	

**ORDER**

AND NOW, this 22nd day of September, 1998, upon consideration of Defendants' Motion to Dismiss and Plaintiff's Response thereto, IT IS HEREBY ORDERED that Defendants' Motion is GRANTED as to Count III of the Complaint and DENIED as to Counts I and II of the Complaint.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.